IRVINE WILL CASE

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vine Greenway as her residuary legatee. The second clause of her husband's will devised to appellant, David Irvine White, "during his natural life" what testator designated as "my farm" containing about two hundred (200) acres situated near Richmond, Ky., and after the death of David Irvine White to the second son of the life tenant, the appellant, David Irvine (White) "provided he drop the White from his name and take that of his grandfather, David Irvine." In the same clause there was bequeathed to testator's half brother, John S. Harris, $5,000, to be invested in a home to be used by the devisee during his life and a this death to the appellant, William Irvine Greenway. Mrs. Irvine in her will made no specific reference to or mention of the two hundred (200) acre farm referred to in the second clause of the will of Mr. Irvine, but she did refer therein in what is designated in the record of the "null and void" clause of her will to that portion of her husbands will "which bequeathes any stocks, bonds, real estate or legacies, of any kind, to the children of Addison and Sarah White of Huntsville, Alabama" and stated therein that "I have made other devisees of my estate which was all my own, I will here state that I was made a 'feme sole' by my father's will and my husband's last will makes a return of all to me."

This contest is between appellant, William Irvine Greenway, on the one side and appellee, David Irvine White and his son David Irvine (White), on the other side, as to who is entitled to the 200 acre farm, the settlement of which requires an interpretation of the portions of the two wills which we have inserted above in the light of other portions of the wills and the circumstances and surroundings of the parties. Appellant contends, (1) that the will of William M. Irvine devised all of his property absolutely and in fee simple title to his wife and that the subsequent attempt by him therein to confer the property upon others with the power in his wife to make a different appointment of it by her will was void and that as residuary legatee of Mrs. Irvine he is entitled to the farm; but is mistaken in this; then, (2) that Mrs. Irvine did legally exercise the power of appointment conferred on her by her husband's will in the execution of her will and that as residuary legatee therein he is entitled to the farm. The appellees combat each of those contentions and the trial court gave judgment in their favor and held that David I. White was entitled to the farm during his life and after his death it went, under the second clause of William M. Irvine's will, to the life tenant's son, David Irvine (White), and that appellant, William Irvine Greenway has no interest therein, and complaining of that judgment the latter appealed.

It appears in the pleadings that appellee, David Irvine (White), since the death of Mrs. Irvine, by a duly prosecuted court proceeding in the county of his residence in the state of Missouri, changed his name from David Irvine White to David Irvine, and there is some question made about the timeliness of that action in order to entitle him to the benefits of the second clause of Wm. M. Irvine's will, but the conclusion we have reached as to the merits of the case makes it unnecessary to enter into a discussion of that question.

Coming now to the principal questions for decision and taking up the first contention, (1), it may be admitted that some of the earlier decisions, including perhaps some from this court, under the ancient common law doctrine that there could be no limitation upon a fee held that where a will or other instrument of conveyance gave an estate absolutely to one with express or implied power of unrestricted disposition the estate could not be reduced by any subsequent provision of the instrument; but the courts generally, including this one, have long since come to the conclusion that the rule requiring the intention of the maker, either of a will or a deed, as gathered from the entire instrument to prevail, over shadows and dispenses with the ancient technical common law rule and that where it appears from the entire language of the will or deed that it was the intention of the maker to limit the estate given or granted to less than an absolute one, that intention will prevail. Hence, it may be said that this court has consistently, since the case of Clay vs. Chenault, 108 Ky. 77, held where one clause of the instrument was broad enough to transfer an absolute title and in another part thereof it appeared that it was the intention of the maker to limit the interest in the corpus of the property in the first taker and to dispose of the entire corpus after the expiration of that interest, such intention would prevail and the first interest would be construed as a limited one according to the terms of the instrument creating it; but, where the attempted limiting clause purported to dispose of what might remain of the corpus, or what might be left of it after the first taken partially exercised his right of entire disposition, then and in that case the attempted limiting clause would be void unless the interest of the first taker was expressly limited to a life estate, in which event his interest would be construed as one only for his life with power of disposition and if he did not exercise the power of the limiting clause would attach to that portion of the property with reference to which the power had not been exercised. Cases supporting the latter proposition are McCullough's Admr. vs. Anderson, 90 Ky. 126, and Peddigo's Executrix vs. Botts, 28 Ky. L. R. 196. The rule is sustained by text writers as well, but we will not encumber this opinion with a citation of them. Cases from this court supporting the first proposition are Mitchell vs. Campbell, 94 Ky. 324; Clay vs. Chenault, supra; Dulaney vs. Dulaney, 25 Ky. L. R. 1659; Ball vs. Hancock, 82 Ky. 107; Commonwealth vs. Stoll's Admr., 132 Ky. 234; Beckner vs. Roth, idem 429; Nelson vs. Nelson, 140 Ky. 410; Todd's Gdn. vs. Todd's Admr., 155 Ky. 209; Knost vs. Knost, 178 Ky. 267; Trustees Presbyteran Church of Somerset vs. Mize, 181 Ky. 567; Commonwealth vs. Manuel, 183 Ky. 50; Phelps vs. Stoner, 184 Ky. 466; Fernandez vs. Martin, 189 Ky. 438, and Thurmond vs. Thurmond, 190 Ky. 582. It was further held in the case of Prindible vs. Prindible, 186 Ky. 280, where the same question of the right to limit in the same instrument what otherwise appeared to be an absolute gift was involved, that "It must not be forgotten, however, that the sole purpose of construing a will is to arrive at the intention of the testator as disclosed by the entire instrument and where that intention is plainly expressed, no technical rule of construction will be permitted to defeat it. Watkins et al, vs. Bennett et al, 170 Ky. 464, 186 S. W. 182. Hence, if upon consideration of the whole will it clearly appears that the testator intended not to devise the entire fee but a less estate, there is no place for the application of the rule that a subsequent limitation over is void because repugnant to the fee. Phelps vs. Stoner's Admr., 184 Ky. 466, 212 S. W. 423." That case more strongly supported the contention of the invalidity of the limiting clause than in any of the cases referred to, or than does the will of William M. Irvine in this case, yet the court, out of supreme deference to the rule requiring the intention of testator to prevail, gave effect to the limiting clause. That it was the intention of William M. Irvine in this case, as gathered from his entire will, to give to his wife, Elizabeth S. Irvine, only the use of the income of his property with testamentary power of appointment, either as to the whole or a part of it except that devised to his half brother, John S. Harris, and if she should fail to exercise such testamentary power of appointment that it should then go as he directed in the remaining portion of his will, we entertain not even the slightest doubt. In fact he could scarcely have expressed such an intention more clearly than he did in the language he employed. It is so clearly so to our mind that we deem it unnecessary to employ any of the auxiliary rules for the interpretation of wills, which are so much discussed in briefs. There being no doubt then as to his intention it results that the only remaining question is whether Mrs. Irvine in her will legally executed that power as to the 200 acres of land involved.

At the outset it should be said that a power must be executed in strict accordance with its terms, i. e., the donor required it to be executed by will it must be done so in that way, and vice versa, if it is required to be executed by deed it can not be done by will but if no mode of execution is prescribed by the donor the power may be executed in any manner which would legally convey the property, which is the subject matter of the power, but in either event there must be manifested in legal form an intention on the part of the donee to execute it 31 Cyc. 1117-118 and 1121, and 21 R. C. L. 792-793. At common law a power ordinarily would not be deemed as executed unless in the instrument by which it was attempted some reference was made to the power or to the property, which was the subject matter of it, unless the executing power would otherwise be ineffectual or a mere nullity and have no operation except as an execution of the power. 21 R. C. L. 795, 31 Cyc. 1122-1123, and under that law it was generally held that a residuary devise or bequest in a will containing no reference to the power, or to the subject matter thereof, would not be a sufficient execution of the power, though some of the courts so holding further held that the power would be deemed executed in the absence of specific references where there appeared a plainly manifested intention to do so. 31 Cyc. supra 1126-1127.

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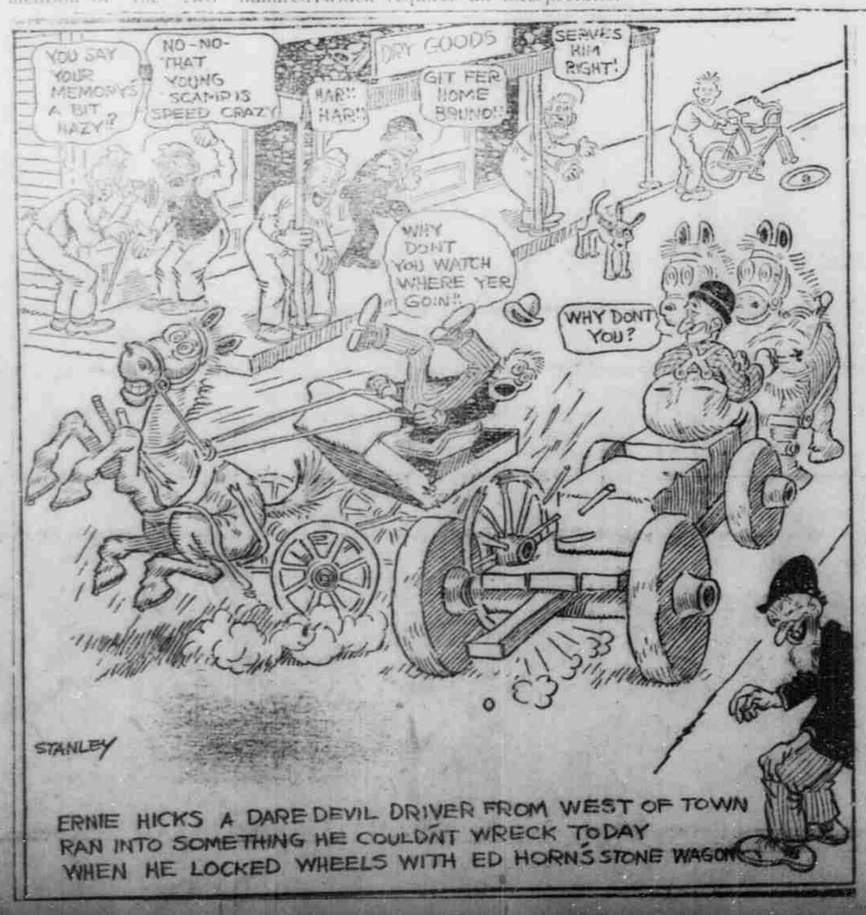

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